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CITATIONS

254484—40

In the Supreme Court of the United States

OCTOBER TERM, 1940

No. 292

WEST SIDE TENNIS CLUB, PETITIONER

v.

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the United States Board of Tax Appeals (R. 72–90) is reported at 39 B. T. A. 149. The opinion of the Circuit Court of Appeals (R. 106–110) is reported at 111 F. (2d) 6.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered May 1, 1940 (R. 110–111). The petition for a writ of certiorari was filed July 31, 1940. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

1. Whether the petitioner was a club "operated exclusively for pleasure, recreation, and other nonprofitable purposes, no part of the net earnings of which inures to the benefit of any private shareholder" so as to be entitled under the statute to exemption from taxation on its income.

2. Whether the petitioner was subject to a 25 per cent penalty imposed by the statute for the late filing of a return without reasonable cause.

STATUTES INVOLVED

Revenue Act of 1932, c. 209, 47 Stat. 169:

> SEC. 103. EXEMPTIONS FROM TAX ON CORPORATIONS.
>
> The following organizations shall be exempt from taxation under this title—
>
> * * * * *
>
> (9) Clubs organized and operated exclusively for pleasure, recreation, and other nonprofitable purposes, no part of the net earnings of which inures to the benefit of any private shareholder;
>
> * * * * *
>
> SEC. 291. FAILURE TO FILE RETURN.
>
> In case of any failure to make and file a return required by this title, within the time prescribed by law or prescribed by the Commissioner in pursuance of law, 25 per centum of the tax shall be added to the tax, except that when a return is filed after such time and it is shown that the failure to file it was due to reasonable cause and not due to will-

> ful neglect no such addition shall be made to the tax. The amount so added to any tax shall be collected at the same time and in the same manner and as a part of the tax unless the tax has been paid before the discovery of the neglect, in which case the amount so added shall be collected in the same manner as the tax. The amount added to the tax under this section shall be in lieu of the 25 per centum addition to the tax provided in section 3176 of the Revised Statutes, as amended.

Sections 101 (9) and 291 of the Revenue Act of 1934, c. 277, 48 Stat. 680 (U. S. C., Title 26, Secs. 103 and 291, respectively), are substantially identical with the above sections of the Revenue Act of 1932.

STATEMENT

The facts, as found by the Board of Tax Appeals (R. 73–83), may be summarized as follows:

The petitioner was incorporated in 1902 under the Membership Corporation Law of New York "to provide and maintain Lawn Tennis Courts and the buildings and accommodations appertaining thereto, for the use of its members, and to promote social intercourse among the members". (R. 74.) It has never issued bonds or certificates of stock. Its members, who have always been admitted through election and payment of initiation fees and dues, totalled 790 and 751, respectively, during the taxable years 1933 and 1934, and assisted, without compensation, in running its affairs. All of its in-

come has always been used exclusively for the payment of its operation expenses and debts. (R. 73–74, 78, 79, 82.)

In addition to facilities maintained for members, consisting of tennis courts and a clubhouse with usual recreational, dining, locker and shower rooms, the petitioner owned and operated, on its property at Forest Hills, a stadium with a seating capacity of about 13,000, for the purpose of holding major national or international championship tennis matches or tournaments, to which the general public was admitted upon payment of admission fees, which ranged from $1.50 to $5.50 for single tickets and from $6.60 to $15 for series tickets. Members were required to pay the same prices as nonmembers for tickets to these major tournaments. (R. 78–79, 81–82.)

These tournaments, held under the auspices of the United States Lawn Tennis Association, have been (by designation by the Association) played on the petitioner's property since 1914; until 1922 temporary stands were erected for the accommodation of the public to witness them. Because of the inconvenience caused to petitioner and its members by the repeated erection of temporary stands, and because of the desire of the Association to obtain a permanent stadium for these events, the stadium was built by petitioner in 1923 at a cost of $269,000 (partly borrowed), in keeping with an agreement with the Association awarding certain

major tournaments to petitioner for 10 years (and, later, for another 10 years, until 1943), upon an agreed division of the net proceeds of the events (R. 74–78.)

At the end of 1933 and 1934, the petitioner, although still owing substantial sums to the Association for loans and on a mortgage made in connection with the erection of the stadium, had surpluses of $225,720.83 and $219,140.74, respectively, after depreciation. (R. 64, 67, 79.)

The petitioner has always collected and transmitted to the Collector of Internal Revenue the required tax on initiation fees, dues, and tickets for the competitions held on its property. Prior to 1934 the officers and directors of petitioner believed that it was exempt from federal income taxes. Upon being notified by the Commissioner that he considered it liable for taxes, petitioner caused to be prepared, and on August 2, 1935, filed under protest, income tax returns for 1933 and 1934, claiming exemption. (R. 82–83.)

Petitioner's income from Club operations for 1933 and 1934 totalled $48,159.37 and $43,762.94, respectively, while its income from major tournaments amounted to $43,764.64 and $30,121.99, respectively, for the two years. Its Club operations (exclusive of major tournaments) resulted in losses for the two years, but from all of its operations the petitioner had, after adjustments by the Commissioner for excessive depreciation, net incomes of

$21,693.84 and $6,330.47 for the years 1933 and 1934, respectively. Upon these net incomes, the Commissioner determined deficiencies and imposed 25 percent penalties for late filing of the returns, (R. 6–11, 65, 68, 79–80.)

The Board of Tax Appeals held that petitioner had failed to establish its right to exemption and that therefore its income, including fees and dues, was subject to tax; the Board also concluded that petitioner had not established reasonable cause for its delay in filing returns and sustained the imposition of the penalties. (R. 83–90.) The decision of the Board was affirmed by the court below. (R. 106–110.)

ARGUMENT

The court below determined, after careful analysis of the particular circumstances shown by the record, that the operation of the tennis tournaments by West Side Club was not incidental to its normal activities conducted for the pleasure and recreation of its members but, on the contrary, was a discrete business activity, producing sizeable, recurrent profits derived from outsiders and having only an indirect relation to the recreational objects of the club (R. 108–109). In its decision the court specifically recognized that a club, without losing its exempt status, may carry on a profitable activity within its own organization, see *Trinidad* v. *Sagrada Orden,* 263 U. S. 578, and may profitably lease or sell part of its property if the profits derived

are either non-recurrent or incidental to its purposes, see *Trinidad* v. *Sagrada Orden, supra; Santee Club* v. *White,* 87 F. (2d) 5 (C. C. A. 1st); *Koon Kreek Klub* v. *Thomas,* 108 F. (2d) 616 (C. C. A. 5th). It concluded, however, that the case at hand presents a materially different situation. Upon its view of the facts, which agreed with that taken by the Board (R. 87–88), the court below, we submit, was clearly correct in its decision that West Side Club had not shown either that it was "operated exclusively for pleasure, recreation, and other nonprofitable purposes" or that no part of its net earnings "inured to the benefit of any private shareholder". Accord: *Jockey Club* v. *Helvering,* 76 F. (2d) 597 (C. C. A. 2d).

1. The cases cited by petitioner (Pet. 7–13), in an attempt to show a conflict, are plainly distinguishable on their facts, and the court below so stated (R. 109). In *Trinidad* v. *Sagrada Orden, supra,* at 579, 580, 582, the taxpayer claiming an exemption was organized, and devoted its entire income derived from rents (and, in small part, from sales of "wine, chocolate and other articles" to its own members "for uses * * * purely incidental" to its work and not for "financial gain"), exclusively for religious, charitable and educational purposes, and its members, who had taken the vow of poverty, owned no interest whatever in any of its properties, either upon dissolution or otherwise. There was thus substantial reason in that

case, as there clearly is not here, to hold that the income-producing activities were incidental to the taxpayer's normal activities and did not inure to the benefit of its members. The Fifth Circuit in *Koon Kreek Klub* v. *Thomas, supra,* at 617–618, concluded that "whatever financial gain was realized [by the taxpayer] was incident to and directed toward the accomplishment of the purposes upon which the exemption is based." Obviously, such a determination depends upon an examination of all the circumstances arising in the particular case; since the Second Circuit in the case at hand took a materially different view of the facts, there plainly is no conflict of decisions. It may be observed, in addition, that the pivotal issue, whether a certain activity is incidental to the objects of a particular club, is of no general importance. Compare *Santee Club* v. *White, supra,* at 8.

2. Since petitioner is not an exempt organization but is taxable as a corporation, as explained above, its dues and initiation fees necessarily constitute a part of the income derived from its operations. There is no conflict of decisions on this question;[1] nor is it, as suggested (Pet. 12), one of general importance.

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[1] Petitioner has found not a single circuit or district court decision upon which to base a claim of conflict; the two Board cases upon which it relies (Pet. 12) raise an entirely different question. See *Valley Waste Disposal Co.* v. *Commissioner*, 38 B. T. A. 452; *Board of Fire Underwriters of*

3. Petitioner does not dispute the proposition that, in order to avoid the penalty for delinquency, the burden was on it to establish reasonable cause for its delay in filing its returns. *Sabatini* v. *Commissioner,* 98 F. (2d) 753, 756 (C. C. A. 2d). Both the Board (R. 89–90) and the court below (R. 110) concluded, in view of the particular circumstances, that no such reasonable cause had been shown. See *Sabatini* v. *Commissioner, supra; American Milk Products Corporation* v. *United States,* 41 F. (2d) 966 (C. Cls.); *Pioneer Automobile Service Co.* v. *Commissioner,* 36 B. T. A. 213; *Groves* v. *Commissioner,* 38 B. T. A. 727. There is manifestly no conflict on this point, as urged (Pet. 13), with *Jockey Club* v. *Helvering, supra.* The taxpayer there filed blank returns within the time allowed (see 30 B. T. A. 670; R. 90); moreover, there the point was not raised before or considered by the Circuit Court of Appeals when it affirmed (76 F. (2d) 597).

Duluth v. *Commissioner*, 26 B. T. A. 860. There the issue was whether a non-profit organization which received and disbursed amounts solely as agent for others, without charge, should be taxed as in receipt of income to the extent of any temporary excess of receipts over disbursements. The case at hand more nearly resembles *Pontiac Employees Mutual Benefit Association* v. *Commissioner*, 15 B. T. A. 74, and *Employes' Benefit Assn. of Amer. Steel Foundries* v. *Commissioner*, 14 B. T. A. 1166, in which the Board held that dues received by non-exempt mutual benefit associations of employees were taxable as income.

CONCLUSION

The decision of the court below correctly applies the statute and the governing principles to the facts of the case. There is no conflict of decisions, and no question of general importance is presented. The petition should therefore be denied.

Respectfully submitted.

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